

HENRY GILLIES, Merchant in Linlithgow, and others who assume to themselves the Titles and Character of Magistrates, and Town Counsellors of the Borough of Linlithgow.

ALLAN WAUGH, present Provost of the said Borough of Linlithgow, and others the Magistrates and Town Counsellors of the said Borough.

Et Contra.

The CASE of the RESPONDENTS in the original, and APPELLANTS in the cross Appeal.

BY an Act passed in the 7th Year of his present Majesty's Reign, intitled "An Act for the better regulating the Election of Members to serve in the House of Commons for that Part of Great-Britain, called Scotland, It is enacted "That at the annual Election of Magistrates and Counsellors for Boroughs, no Magistrate or Counsellor, or any Number of Magistrates or Counsellors, shall for the future, upon any Pretence whatsoever, take upon him or them to separate from the Majority of the Magistrates and Counsellors, who have been such for the Year preceding, and to appoint or elect separate Magistrates or Counsellors; but shall submit to the Election made, and to the Magistrates and Counsellors elected and appointed by the Majority of the Town Council assembled: And if, contrary to the Direction of this Act, any Number of Magistrates or Counsellors, shall, in Opposition to the Majority, take upon them to make a distinct and separate Election of Magistrates or Counsellors, their Act and Election shall be *ipso facto* void, and every Magistrate or Counsellor who concurred therein, shall forfeit and lose the Sum of 100l. Sterling to be recovered by the Magistrates and Counsellors from whom they separated, in Manner herein after directed."—And it is further enacted, "That it shall, and may be lawful to, and for any Magistrate or Counsellor of the Borough who apprehends any Wrong was done at any annual Election, to bring his Action before the Court of Session in Scotland for rectifying such Abuse, or for making void the whole Election (if illegal) only within the Space of eight Weeks after such Election is over: And the Lords of Session shall, and they are hereby expressly authorized and required to hear and determine the Cause summarily, and to allow to the Party that shall prevail, their full Costs of Suit." And by another Act passed in the 16th Year of his present Majesty's Reign, intitled, "An Act to explain and amend the Laws touching the Elections of Members to serve for the Commons in Parliament for that Part of Great-Britain, called Scotland, it is enacted—"That at the annual Election of Magistrates and Counsellors, and in all the Proceedings previous to the Election of the Magistrates and Counsellors for the succeeding Year, it shall not be lawful for the Minority of any Meeting for Election either of Magistrates or Counsellors, or Deacons, or other Persons, who by the Constitution of the respective Boroughs, may have Votes in the Election of Magistrates or Counsellors, to separate from the Majority of those having a Right to act by the Constitution of the Borough at such Meetings, upon any Pretence whatsoever; nor to make any separate Election of Magistrates, Counsellors or Electors; but the Minority shall in all Cases submit to the Election made by the Majority in all the Parts of Election: And if any Person elected by the Minority of any such Meeting, shall presume to vote in the Election of Magistrates or Counsellors, or in letting the Magistrates or Counsellors, or in any other Step of the Election, he shall forfeit the Sum of 100l. Sterling to any one of the Majority of such Meeting, to be recovered by him in the Manner hereafter directed."

By the Sett or Constitution of the Borough of Linlithgow, dated in the Year 1709, and recorded in the Books of the Convention of Boroughs, the Town Council consists of twenty-seven Persons, viz. a Provost, four Bailies, a Dean of Guild, a Treasurer, twelve Merchant Counsellors, and eight Deacons, who are chosen annually by the eight several Incorporations of Smiths, Taylors, Bakers, Shoemakers, Weavers, Wrights, Coopers and Butchers. The Provost, Bailies, Dean of Guild, Treasurer and twelve Merchant Counsellors, are to be of the Estate and calling of Merchants, or of such other Burgesses, as are not incorporated with the Trades; and the Form and Manner of the annual Election is as follows.

About the middle of September yearly, the eight several Incorporations meet at such Time and Places as are previously appointed by their respective Deacons, and choose a Leet (List) of three Persons of their own Number, which Leets are presented to the Town Council upon the Saturday before St. Matthew's Day, being the 21st of September yearly, from each of which Leets the Council strikes out one, and the remaining two, with the Deacon for the preceding Year, are the Leet out of which the Incorporation must chuse the Deacon for the next Year, and the Person struck out by the Council, who is called the Chancellor, presides at the Meeting for Election of the Deacon, and has a casting or decisive Vote, in Case of Equality.

On the Saturday thereafter, the special Master-men of the eight Incorporations present their new Deacons to the Council who are sworn and admitted Counsellors, till the next Michaelmas, and at the same Meeting, the Merchant Counsellors, and new Deacons so admitted, add twelve Persons, to the twelve old Merchant Counsellors, and out of these twenty-four, as a Leet, the twelve new Merchant Counsellors are chosen.

And the Election of Magistrates is upon the first Monday after Michaelmas in this Manner: The Provost is chosen by the whole Council, out of a Leet of two Merchant Counsellors added to the Provost for the Year preceding: The four Bailies are chosen by the whole Council, out of a Leet of eight Merchant Counsellors added to the Bailies for the Year preceding: And a Leet of two is chosen to be added to the Dean of Guild, and as many to the Treasurer, and out of that Number, the new Dean of Guild and Treasurer are chosen by the whole Council.

The Boroughs of Linlithgow, Lanark, Peebles, and Selkirk, return one Member to the British Parliament, and the Delegate for each of these Boroughs, in its Turn presides.

Linlithgow presided at the last general Election, and on that Occasion, the Town Council was divided into two Parties, fifteen to twelve; but the Choice of the Delegate voted for by the Majority was not objected to.

Of the Majority seven were Deacons of Crafts, and only one Deacon voted with the Minority, there being eleven of the Merchant Counsellors in the Minority, and only eight with the Majority, about the Time of the annual Election 1754, a Scheme was formed by the Minority to exclude the Deacons from their Right of voting, whereby it was foreseen, that the Majority of the Merchant Counsellors, might model the new Council as they pleased.

The Elections of the new Deacons, are generally made about a Week before Michaelmas, but till they are presented to, and received by the Council, they are only considered as Deacons elect, the whole Power is understood to remain with the old Deacons, and the Practice had been, for the old Deacons to sit and vote in Council, till their Successors were respectively received in their Places.—This Practice is plainly agreeable to the Sett of the Borough, a Copy whereof is hereto subjoined.

On

And the Appellants
Sept. 21st
Council for receiving the Letters
from the several Incorporations.

Leets of the Smiths,
Taylors, Bakers, Shoemakers,
and Weavers, received without any
Objection: two Leets presented
from each of the other three Incorporations.
The Council preferred the Leets
chosen by the Majority of the
Smiths and Bakers, and by the
Minority of the Weavers.

The several Incorporations
elected the same Persons Deacons, who
then served in that Office.
28th September.
Meeting of the Council
for receiving the New
Dacons, and for electing
the Merchant Counsellors.

Objection to the sitting
of the Old Dacons.
Moved that they should
be ordered to withdraw.
Division on this Motion,
nine for the Motion,
fifteen against it.
Deacon of the Smiths
presented to the Council.
Objection to his Election.

Question put as to the
Relevancy.
Division, nine for the
Relevancy, fourteen that
it was not Relevant.

Dispute which of the
Parties carried the
Question.
The Party of nine
suspend the Town Clerk
and appoint another in
his Place.

The other Party continued
the Clerk, and proceeded
to the Admission of the Dacons.

---And to the Election
of the New Merchant
Counsellors, in the usual
and regular manner.

---And in each of their
Votes put the Question
to the other Party of
nine.

In the mean Time the
Party of nine were examining
Witnesses to prove the Objection
against Deacon Davis.

---And the other Party
of fifteen, joined them
before this Examination
was finished, and voted
throughout all the other
Steps of the Election, for
the same Persons whom
they had voted for in the
Election made by themselves.

Mutual Actions of
Declarator, and Reduction
brought.

And a summary Complaint
in Terms of the
Act 25mo. George II. by
the Respondent.

14th January 1755.
1st Interlocutor of the
Lord Ordinary appealed
from.

3rd. January 1755.
2d. Interlocutor of the
Lord Ordinary appealed
from.

On the 21st of September 1754, being the Saturday before St. Matthew's Day, the Dacons presented to the Council, the Leets of the several Incorporations, to be Candidates for the Office of Dacons, the then ensuing Year, and to the Leets of five of these Incorporations, no Objection was made, and therefore one Name out of each was struck out as usual by the Council, without any Dispute. But for each of the three remaining Incorporations, to wit, the Coopers, Butchers, and Wrights, two Leets were presented, and a Division of fifteen to ten. The Council preferred the Leets chosen by the Majority of the Coopers and Butchers, and the Leet chosen by the Minority of the Wrights, in Respect it appeared that the Majority had entered into an unlawful Combination, and executed Bond, binding themselves to vote for one of the Subscribers of that Bond to be Dacons.

In the Week following the several Incorporations met, and elected as their Dacons for the ensuing Year, the very same Persons, who were respectively serving in that Office, for the Year then near expiring.

On Saturday the 28th of September, the Day appointed for admitting the new Dacons, and electing the twelve Merchant Counsellors, the Council met, and the Dacons, in whom both Characters of old and new were united, having taken their Seats at the Council Table, the Majority of the Merchant Counsellors then made public the ingenious Device, which they had fallen on, effectually, ever after to deprive the several Incorporations of Craftsmen, and their Dacons of their Interest in the Election, and to engross the whole Power thereof to the Merchant Counsellors. An Objection was started, "That the Dacons ought not to be admitted to sit, till the Merits of their several Elections should be tried one by one;" and it was moved, That they should be ordered to withdraw: And a Question being accordingly put, nine of the Merchant Counsellors voted for their Removal; and eight of the Merchant Counsellors, with seven of the Dacons, insisted that no such Vote should be put, and gave it as their Opinion, that the Dacons should continue.

John Davis, Deacon of the Hammer-men, or Smiths (the senior Incorporation) presented to the Council the Minutes of his Election, and informed them, that the special Master-men of his Incorporation were attending at the Door ready to declare his Election; whereupon, John Perrier (one of the nine Merchant Counsellors who voted for the Exclusion of the Dacons) produced to the Council an Objection to John Davis's Election, signed by James Brown, Hammer-man, setting forth, That John Davis was not legally elected, in respect that he had not given the Incorporation twenty-four Hours previous Notice of the Meeting for the Election; but had only warned them the Night preceding, to meet next Morning. ---and the Question being put, Whether or not the above Objection was relevant, and if a Proof of it should be allowed? Nine of the Merchant Counsellors voted, That it was relevant, and to allow Proof. ---Eight Merchant Counsellors and six Dacons (being all the Dacons present except John Davis) voted, That the Objection was not relevant, because by an Act of Council of 14th September 1723, it was declared sufficient to warn the Trades, the Night preceding the Election of their Dacons.

A Dispute then ensued, which of the two Parties had carried the Question. The nine Merchant Counsellors who had voted for the Exclusion of the Dacons, insisted that they had the Majority by one; the other Party contended that they had a Majority of five, including the Votes of the Dacons: And the Town Clerk, being about to minute, That it was carried to repel the Objection of John Davis's Election, one of the nine Merchant Counsellors snatched the Book from the Clerk, and the remaining eight concurring with him, they pretended to suspend the Clerk from his Office for two Months, and appointed one of His Grace the Duke of Hamilton's Servants to officiate in his Room. The other Party consisting of eight Merchant Counsellors, and seven Dacons, apprehending that they had carried the Question, to repel the Objection to Deacon Davis's Election, and that Duke Hamilton's Servant was appointed Clerk by a Minority, continued the Town Clerk, and then proceeded to call in the Master-men of the several Incorporation, to declare the Election of their Dacons: Accordingly the Master-men of all the Incorporations (except those of the Bakers) severally appeared, and declared the same Persons elected their Dacons for the ensuing Year, who were respectively serving in that Office the then current Year: And afterwards they proceeded to the Election of the Merchant Counsellors, for the ensuing Year, Step by Step, observing all the Forms usual and requisite in such Cases, particularly that of putting a Vote, upon each of the twelve Merchant Counsellors, whether they should be continued, or new ones chosen in their Places.

All this was done in the same Room, and at the same Table, with the nine old Merchant Counsellors, who had voted for the Exclusion of the Dacons --- and in each of the Votes the Question was put to these nine Persons, but they refused to vote, saying, that they had not come that Length.

In the mean time, the nine Merchant Counsellors were examining Witnesses to prove the Objection, which they had voted relevant, to set aside the Election of John Davis, Deacon of the Hammer-men; and before this Examination was finished, the other Party had gone through their whole Elections. But in order to remove every Objection, or even cavil to their Election, they immediately joined the opposite Party, of nine Merchant Counsellors, and throughout all the Steps of their Proceedings, voted in every Question, and for the same respective Persons to be readmitted Dacons; removed from the Council, and elected new Counsellors, whom they had voted so, in the Election made by themselves as above-mentioned.

On the other hand, the opposite Party, under Pretence of having a Majority of one, and determined at all Hazards to keep that Majority, voted the Elections of three Dacons in the other Interest void: And with respect to the Elections of the Dacons of the Wrights, Coopers and Flethers, in each of which, there was an Opposition, The said nine Merchant Counsellors, voted the Persons chosen by the Opposition to be duly elected Dacons of these three Incorporations: And afterwards they (joined by the Deacon of the Baxters, and the three pretended Dacons of the Wrights, Coopers and Flethers, making in all thirteen) voted for a new Leet, and Election of twelve Merchant Counsellors; the remaining eight Merchant Counsellors, with the seven Dacons admitted by them, having in each of these Questions voted as they had done in the Election made by themselves aforementioned.

At the Meeting of the Council for the Election of Magistrates, the eight Merchant Counsellors, and seven Dacons, with those whom they had voted in Merchant Counsellors, elected the Respondents --- and the nine Merchant Counsellors, and the Deacon of the Baxters, with the three pretended Dacons of the Wrights, Coopers and Flethers, and those Persons whom they had elected in Merchant Counsellors, elected the Appellants.

There being thus two Sets of Magistrates and Counsellors chosen, mutual Actions of Declarator and Reduction, were brought by the Parties in the Court of Session.

And the Respondents, at the same Time, in Terms of the Act of the 16th of his present Majesty, presented a Petition and Complaint to the Court for annulling and declaring void the Appellants Election, establishing their own, and recovering of the Penalties inflicted by the Act.

The Appellants having omitted to make John and Andrew Buckneys, two of the Counsellors, Parties to their Reduction and Declarator, the Lord Ordinary of this Date, pronounced the following Interlocutor: "Sustained the Objection made by the Defendants, that John and Andrew Buckneys are not called, or Parties in the Process, and therefore found in Favour of the Respondents."

The Appellants applied by Representation, to the Lord Ordinary against this Interlocutor, and which having been answered by the Respondents, his Lordship, by Interlocutor of this Date, "refused the Desire of the said Representation, in respect of the Answer, and adhered to his former Interlocutors."

Against

Feb. 1755, 18.
of the whole
appealed from.

by Respondent.
the Attempt to
the Deacons from
on 28. September
was a premeditated

from the Year
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Admission on
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by the Minu-
th Elections.

August 1755.
of the
Lords appealed

August 1755, In-
of whole Lords
from.

August 1755, In-
appealed from,
of Appeal.

September 1755,
of whole

Against both these Interlocutors of the Lord Ordinary, the Appellants desired, by Petition, to the whole Lords, and their Lordships, without giving the Respondents the Trouble of making any Answer, to refuse the Desire of the Petition.

The other Action and Complaint were afterwards conjoined, and a Proof allowed to each Party upon which it came out on the Respondents Behalf, That the Attempt to exclude the Deacons from voting in the Meeting of Council on 28th September 1754, was a premeditated Scheme: That a few Days before the said Meeting of the 28th September, the Appellant, John Farrier, meeting the Town Clerk, said, *He had the letter of a Saturday, but we'll have the better of you next Day, for that, they* (by which the Deponent understood John Farrier, meant Baillie, Smith and his Party) *were not to allow a Deacon to vote.*

It was further proved, — That from the Year 1640, and downwards as far as there were any Traces of Records, to the Year 1690, the old Deacons had uniformly sat and voted as constituent Members of the Council of *Linlithgow*, in several Meetings at which their Successors were admitted; and it was alleged, and not contradicted, that such was the universal Practice over all *Scotland*.

And Reference was made to a Judgment of the Court in 1746, in the Case of a contraverted Election for the Borough of *Inverkeithing*, where the whole Election depended upon the Votes of the old Deacons, and the opposite Party having kept them out by Force from the annual Election, the Court "Found that the old Deacons had a Right to be present, and vote at the Election, and therefore reduced the Election made by the opposite Party, and sustained the Election made by the old Deacons (who had declared their Votes at the Council Seat) and the Party who concurred with them." And this, notwithstanding that before that Year, the old Deacons had never been used to exercise this Privilege, the Court declaring their Opinion, that the old Deacons were constituent Members of the Council, till such Time their Successors were admitted.

It was likewise proved that of late Years, in some Instances where Disputes had happened in the Council with respect to the Election of Deacons, that the Practice had been, first to (wear in, and admit the other Deacons, before the Council proceeded to examine into the contraverted Election: And that in such Cases, where only one Deacon was returned by any of the Incorporations, and an Objection made to the Election of that Deacon, the Practice had been, to admit and receive the Deacon, and only to enter the Objection on Record, that if any Person or Persons thought themselves aggrieved by such Admission, they might take their Relief by due Course of Law, and bring a Reduction of the Election.

The Appellants in their Answer to the Respondents Petition and Complaint, admit, "That at the Meeting of the Council on the 28th of September, 1750, the Respondents, after making their own Election, returned and joined the Appellants and the Council," and that the Respondents actually joined the Appellants, and voted with them in every Question, after the Witnesses to the Objection to John Davie, had been examined, is proved by the concurring Testimonies of several unexceptionable Witnesses, and by the Minutes of Elections, made up by the different Clerks of both Elections.

On the 7th of August, 1755, the Lords of Session, pronounced the following Interlocutor, Having advised this Process, Testimonies of the Witnesses adduced, Writs produced, with the Debate thereon, they repel the Objections made to the Election of John Davie, as Deacon of the Hammer-men or Smiths, William Smith, as Deacon of the Shoes-makers, and William Wardrope, as Deacon of the Weavers, and find that each of them were regularly elected Deacons from their respective Incorporations, at Michaelmas last, as also sustain the Election of William Macdonald, Deacon of the Wrights, and prefer his Election to that of John Laurie, and with respect to the Election of the Deacon of the Coopers, find that William Young was not a Freeman of that Trade, at Michaelmas last, and therefore had no Right to vote at that Election; but that John Brown was a Freeman, and intitled to vote thereat; and therefore sustain the Election of John Montgomery, as Deacon of the Coopers, and prefer him to Alexander Nimmo: As also sustain the Election of John Frame, as Deacon of the Fleethers, and prefer him to Thomas White: And with regard to the Point, whether or not the old Deacons were intitled to sit and vote at the last Michaelmas Meeting, as constituent Members of the Council, find that in Possessor the old Deacons were lawfully excluded from voting at the Meeting of Council upon the said 28th of September last: And in respect of the Pursuers Separation from the Majority of the Council upon the said 28th of September last, refuse to declare the Election of the Pursuers as Magistrates and Counsellors, and absolve, and the Defenders from the Declarator brought at their Instance: But find and declare the Election of the Counsellors and Magistrates made by the Defenders at Michaelmas last, illegal, void, and null; and reduce, decern and declare accordingly: As also allow the Decreet to be extracted referring to either Party to be heard against November then next upon the Question, whether the Deacons have Right to sit and vote in the Council, ay, and while their Successors are admitted."

The Appellants preferred a Petition to the Court against so much of this last Interlocutor as "preferred the Election of William Macdonald, as Deacon of the Wrights, to that of John Laurie, the Election of John Frame, as Deacon of the Fleethers, to that of Thomas White; and declaring the Election of the Counsellors and Magistrates made by the Appellants illegal, void and null;" but the Lords of Session, without putting the Respondents to the Trouble of an Answer, "adhered to their former Interlocutor, and refused the Desire of the Petition."

The Respondents having likewise petitioned the Court to review such Parts of the Interlocutor as sustained the Election of John Montgomery, Deacon of the Coopers, and preferred him to Alexander Nimmo, and found that in Possessor, the old Deacons were lawfully excluded from voting at the Meeting of Council upon the 28th of September last; and in respect of the Respondents Separation from the Majority of the Council, upon the said 28th of September, refused to declare the Election of the Respondents as Magistrates and Counsellors and absolved the Appellants from the Declarator brought at their Instance.

The Lords of Session, by Interlocutor dated the said 9th of August, 1755, "Refused the Desire of the said Petition, and adhered to their former Interlocutor, except that Part of it, which sustained the Election of John Montgomery, as Deacon of the Coopers, and preferred him to Alexander Nimmo: As to which they appointed the Petition of Alexander Nimmo to be seen and answered."

And Answers having accordingly been put in for John Montgomery, the Lords of Session, by Interlocutor of this Date, "refused the Desire of the Petition, and adhered to their former Interlocutors."

The Appellants have thought proper, to appeal from the said Interlocutors of the Lord Ordinary of the 14th and 21st of January, 1755, the Interlocutor of the whole Lords of 18th of February, adhering to the Lord Ordinary's said two Interlocutors; and against such Parts of the Interlocutor of the 7th of August, 1755, as are complained of by the Appellants reclaiming Petition, and against the first Interlocutor of the 9th of August, 1755. But all these the Respondents humbly hope will be affirmed, and the Appeal dismissed with Costs, for the following, among other,

R E A S O N S

It is a Principle founded on Reason, and clearly established by the Laws and Practice of *Scotland*, that no Process can proceed, unless where all Parties having Interest are called. — It is not disputed by the Appellants, that both John and Andrew Buckney were Members of the Council for the Year preceeding Michaelmas 1754, that John

Buckney

Buchan, a Freeholder of the Borough for that Year, was a Justice, a Councillor for the next Year, and that *Andrew Buchan* had been elected by the Appellants at the Election 1754, and therefore, as they had a plain Interest in the Question, which of the two Elections ought to be sustained, they were necessary Parties to the Suit brought by the Appellants.

II.

The Elections of *John Davis*, Deacon of the *Hammer-men*; of *William Smith*, Deacon of the *Shoe-makers*; and of *William Wardrope*, Deacon of the *Weavers*, having been made by a great Majority of their respective Incorporations, without any Competition, or other Candidate appearing for those Offices, these three several Elections must stand unimpeachable, as no Reduction has been properly brought of them; for want of necessary Parties, within the Space of eight Weeks, or two Calendar Months, in Terms of the Statutes of the 7th and 10th of the King.

III.

Objection to the Election of the Deacon of the Hammer-men.

Answer.

Even supposing it still competent to the Appellants, to go into the Merits of these three Elections, the Respondents contend that the same would appear valid and unexceptionable. — The Objection to Deacon Davis's Election is, *That the Time appointed for the Election, was not twenty-four Hours, after the Warning given to the several Members.*

The Matter of Fact, which will not be controverted is, That in September 1754, there were twenty Members belonging to this Incorporation, one of whom, was then out of the Kingdom; At setting the Leet for Deacons, the three Persons presented to the Council, were chosen by thirteen Voices out of nineteen, being the total Number then present; the Warning to the Members for the Election of their Deacons, was made about eight o'Clock at Night, to meet next Day at ten o'Clock; each of the nineteen Members had Notice, and twelve of them attended, the Meeting. They proceeded first to the ordinary Business of the Incorporation, which took them up till Noon, and then eleven of the twelve voted for *John Davis* to be Deacon: *James Brown*, the only other Member present, though he had concurred with the Meeting in the other Business of the Day, yet when the Election of the Deacon came on, he left his Seat, and took a Protest against the Meeting, because they had not twenty-four Hours previous Warning. — And as to the Objection it is answered, — First, That there is no Law or Usage requiring twenty-four Hours notice to the Members of this Incorporation of the Elections of their Deacons. — Secondly, By an Act of Council of this Borough, dated 14th of September, 1723, it is declared sufficient to give Notice the Night before the Election; and — Thirdly, agreeable to this Act the constant Practice has been for the Deacons, to warn the Trade, the Night before the Election, which is proved by several Witnesses.

Objection to the Election of the Deacon of the Shoe-makers.

Answer.

It was objected to the Election of *William Smith*, Deacon of the *Shoe-makers*, *That the Deacon did not warn his Trade to the usual Place.*

This Objection not having been made, at the Meeting of the Trade for setting their Leet, or at the Meeting of the Council, for receiving the same, cannot now be received. — There is no Law or Act of the Trade confining the Elections, to any particular Place, and accordingly it appears from the Evidence, that the Incorporation of *Shoe-makers* have been used to meet at different Places to make their Elections. — At *Michaelmas* 1754, there were fifty-five Members belonging to this Incorporation, eleven of whom were Non-Residents. — Fifty-nine Members were present at setting the Leets, and the Leet returned to the Council, was chosen by a great Majority. — At the Meeting for the Election of the Deacon, forty-four Members attended, of whom forty-one voted for the Respondent, *William Smith*.

Objection to the Election of *William Wardrope*, Deacon of the Weavers.

Answer.

The Appellants Objection to the Re-election of *William Wardrope*, as Deacon of the *Weavers*, is, *That at setting the Leets for this Incorporation, the Votes for some of those to be put on the long Leet (it is the Practice of this Trade, first to chuse a long Leet of six, and out of them, to elect the Leet of three returned to the Council) stood fourteen to fourteen, and that the Deacon did not give a casting Vote.*

This Objection not having been moved at the Meeting for choosing the Leets, or at presenting the short Leet to the Council, is not now competent.

2dly. The Fact was otherwise, for the Incorporation consisted of twenty-six Members, and in the Instance where the Votes for the long Leet ran the nearest, fourteen (whereof the Deacon was one) voted on one Side, and only twelve legal Votes on the other, so that there was no Occasion for a casting Vote. — Thirdly, Admitting the Fact true, and that it might afford an Objection, yet it was waived by the whole Members, voting for the short Leet, out of the long Leet, and that short Leet, being unanimously approved of afterwards, and received by the Council. — Fourthly, In any Event it could not affect Deacon *Wardrope's* Election; for he as Deacon for the current Year, necessarily must have stood on the Leet for the ensuing Year, and his Election of Deacon was unanimous in a Meeting of twenty-five Members, there being only one Member of the whole Incorporation absent.

Objection to the Election of the Deacon of the Wrights.

Answer.

The Objection to the Election of *William Macdonald*, Deacon of the *Wrights*, *That he was elected by a Minority of the Incorporation,* is not now competent to the Appellants: *William Macdonald* was the only Person of the Leet approved by the Council, for whom a Vote was given, and as *John Lawrie*, the other Person voted for, did not stand on the said Leet, his Relief, if any he had, must have been by a summary Complaint, or by an Action of Reduction and Declarator, and as that has not been properly brought, within the Time limited by the Statutes of the 7th and 10th of the King, Deacon *Macdonald's* Election is now un-impeachable.

Election of the Deacon of the Fleishers.

Objection 1st.

Objection 2d.

Answer.

The Appellants have made two Objections to the Election of *John Frame*, Deacon of the *Fleishers*. — 1st. *That the abusing of the Leets, and the Election of the Deacon, were made in private Houses, and not in the Fleish Market as usual,* 2d. *That a Number of Men were brought into the Town of Linlithgow, and surrounded the House, where the Members met, to chuse their Leets, in Order to overawe the Election.*

The Appellants admit, that Deacon *Frame*, was chosen by a Majority of the Incorporation, and that all the Members had timely Notice of both the Meetings of Election, and as no Complaint, or Reduction was properly brought, for setting aside his Election, within the Time limited, by the Statutes abovementioned, his Election is now unchallengeable; besides the Election of *Robert White*, the Appellant cannot be supported, as he was not on the Leet approved by the Council.

And if it were competent to the Appellants to go into the Merits of this Election, it would appear valid and unexceptionable.

Answer to 1st.

To 2d.

As to the 1st. Objection, — There is no Law or Act of this Incorporation confining their Meetings for Election, to any particular Place, and it is proved in the Cause, that they have been used to meet on these Occasions, at different Places. — The 2d. Objection (which was not made either at the Meeting of the Council for approving the Leets, or at the subsequent Meeting for admitting the Deacons) is entirely without Foundation, and the contrary so far true, that the Appellants themselves, attempted to overawe this Election, by bringing into the Town some Hundreds of Colliers from his Grace the Duke of Hamilton's Coal Works, about the Time when the Leets were chosen, and these Colliers behaved in a very riotous Manner, carrying off and detaining in Confinement for some Days three of the Members of the Incorporation of *Fleishers*, and also some of the Members of the other Incorporations.

The Election made by the Appellants, taken in every View even the most favourable, was clearly illegal, void, and null; the legal Majority, being on the Side of the Respondents in every Question.

The

The Respondents humbly apprehending themselves aggrieved by such Part of the said Interlocutor of 7th August 1755, as in and to the said Interlocutor, the said Respondents were thereby bound to obey, and at the Meeting of Council upon the 28th of September 1754, and consequently to sustain the Election of the Respondents, and assist the Appellants from the Declarator brought at their instance, and sustain the Election of John Montgomery, Deacon of the Coopers, and preferred him to Alexander Nimmo; and by the Interlocutors of 9th August, and 9th December 1755, sustaining the Respondents' Part of the said Interlocutor of 7th August 1755, have brought their Cause on Appeal, from the said Part of the said Interlocutors, and humbly hope, the same shall be reversed for the following among other,

R E A S O N S

I. The Interlocutor of 7th August 1755, supposes the Merits of the Election, with the Respondents, and the only Reason assigned for not declaring their Election, is, in Respect of the Separation (supposed) made by them at the Meeting of Council of 28th September. The Question on this Part of the Argument, turns chiefly upon the Right of the Deacons to be at all Times, constituent Members, as to which, the ancient Usage, the Sett of the Borough, the uniform Practice of all the other Boroughs in Scotland, and the Reason of the Thing, all concur to establish this Right in the Deacons beyond Possibility of a Doubt; and tho' their omitting of late Years to exercise this Right, when there was no Occasion for it, may so far justify the Appellants, as to save them from Penalties, yet the Right itself cannot be affected; it must remain entire, to be exercised whenever claimed.

As therefore the seven Deacons (in whom both Characters of old and new Deacons were united) and the eight Merchant Counsellors who voted with them, joined the Respondents in all their Proceedings of 28th September 1754, the Respondents thereby had a clear Majority, being fifteen to ten and consequently the Appellants, being a Minority, separated from the Majority, and this puts an End to all Questions between the Parties, for if the Election made by the Respondents on the 28th of September 1754, was by a clear Majority of the constituent Members, it cannot now be quarrelled, as no Reduction thereof hath been properly brought.

II. Supposing the old Deacons, not constituent Members of the Council on the 28th September 1754, yet even then, they, and the eight Merchant Counsellors who voted with them, cannot be considered as Separatists, within the Sense and Meaning of the Acts of Parliament, it being clearly proved, that they joined the Appellants, and voted with them (but for their own Lists) in every Question of the Day, which avoided any Effect arising from a temporary Separation, for the short Time only, in which the Witnesses to the Objection against Deacon *David* were examining.

At the Election of a Deacon for the Incorporation of *Coopers*, the Votes stood five to five; and the Chancellor of the Incorporation, who presided at the Meeting, gave his casting Vote for *Alexander Nimmo*, which determined the Election in his Favour.

William Young, one of the Members who voted for *Alexander Nimmo*, had not been regularly admitted a Freeman of the Incorporation.

William Young, its admitted, had an undoubted Right to demand his Freedom: It appears from Evidence in the Cause, that he did demand it, and in Consequence thereof, was regularly admitted by a Majority of the Trade.

John Brown, one of the Voters for *John Montgomery*, was irregularly admitted to his Freedom by a Minority of the Incorporation, contrary to the declared Sentiments of the Majority at a former Meeting, and at a Time when he was disqualified from taking up the same, by a standing Law of the Incorporation.

A. L. FORESTER,

G. BROWN.

The Set of the Borough of LINLITHGOW.

At Linlithgow the 6th of August 1709. The which Day the Council approves of the Sett of the Town given in at the last Convention of Boroughs, and appointed the same to be recorded in the Council Books, whereof the Tenor follows.

The whole Number of the Magistrates, Merchant-Counsellors and Deacons of Crafts, consists of twenty-seven Persons, to wit, the Provost, four Bailies, the Dean of Guild, Treasurer, twelve Merchant-Counsellors, and eight Deacons, to wit, of the Smiths, Taylors, Baxters, Cordiners, Weavers, Wrights, Coopers and Elethers. The Provost, Bailies, Dean of Guild, Treasurer, and twelve Counsellors, are to be of the Estate and Calling of Merchants, or of such other Burghesses as are not incorporated with the Trades.

The Manner of Election is as follows:

On Saturday before St. Matthew's Fair, which falls on the 21st of September, yearly, the Deacons give into the Council, to be approved by them, an Account of their common Good the Year preceding with the List of their Deduction of three Persons, one of which three is deleted by the Council; and the present Deacons, and the other two, are on the Leet: And thereafter the several Incorporations meet, and elect their Deacons, out of the said Leet; and the Person deleted is always Preses at the Election of the Deacon.

On the Saturday thereafter, the special Master-men of the Crafts presented their new Deacons to the Council, who are sworn and admitted Counsellors until the next Michaelmas, and the same Day, the new Merchant-Council of Twelve, is chosen by the old Council as follows.

There are Twelve chosen on the Leet, and added to the old Council, out of which Number, the new Council is to be chosen, one by one; and the same Days the Leets of the Provost, and the Leet of the Dean of Guild, not being Deacons, but the Leet may be altered the Day of Election.

The Election of the Magistrates, which is always upon the first Monday after Michaelmas, is as follows. First of the Provost: The Leet made the last Council-day, is either continued, or a new Leet of twelve chosen, and added to the present Provost, out of which Number the new Provost is chosen. Secondly, of the Bailie: There are eight Persons chosen on the Leet, out of the Merchant-Counsellors, who are added to the present Bailie, and out of that Number the new Bailies are chosen; one Bailie, with two on the Leet with him, removing by Turns. Thirdly, of the Dean of Guild, and Treasurer. There are two chosen on the Leet for each of them out of the Merchant-Council, who are added to the present Dean of Guild and Treasurer, and out of that Number the new Dean of Guild and Treasurer are chosen, who are all to continue until the Election at the next Michaelmas.

Die Mercury 5th May 1756.

Ordered & Adjudg'd, that the said Original & Cross Appeals be and the same are
herby dismissed this House, And that the said several Interlocutors therein in
Complain'd of be, and the same are herby affirm'd.

HENRY GILLIES and Others - Appellants.

ALLAN WAUGH and Others, Respondents.

Et contra

The CASE of the Respondents in the
original Appeal, and Appellants in the
cross Appeal.

To be Heard at the Bar of the HOUSE of LORDS
On Wednesday the 28th Day of April 1756.